

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

DEAN ALLEN MCBAINE,)
)
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Movant,)
)
)
v.) No. 4:21-cv-33-AGF
)
)
UNITED STATES OF AMERICA,)
)
)
Respondent.)

MEMORANDUM AND ORDER

This matter is before the Court upon Dean Allen McBaine's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence. Because McBaine's direct appeal remains pending, the Court dismisses the motion without prejudice as premature.

Background

On October 3, 2019, McBaine was adjudicated guilty of knowingly possessing a destructive device that was not registered to him. *United States v. McBaine*, No. 4:19-cr-63-AGF (E.D. Mo. 2019). On January 15, 2020, the Court sentenced McBaine to sixty months' imprisonment, to be followed by three years of supervised release. McBaine appealed, and at present, his appeal is pending before the United States Court of Appeals for the Eighth Circuit. *United States v. McBaine*, No. 20-1395 (8th Cir. 2020). Review of the record before the Court of Appeals shows the case was submitted on the briefs without oral argument on January 11, 2021.

Discussion

A motion attacking a federal criminal sentence pursuant to 28 U.S.C. § 2255 is premature when filed during the pendency of the direct appeal of that same criminal sentence. *See United States v. Jagim*, 978 F.2nd 1032, 1042 (8th Cir. 1992) (because a direct appeal was pending, the

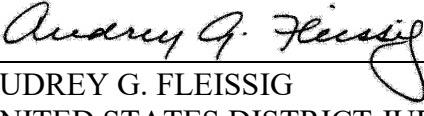
district court properly dismissed the Section 2255 motion as prematurely filed); *see also Masters v. Eide*, 353 F.2d 517, 518 (8th Cir. 1965) (per curiam) (“[o]rdinarily resort cannot be had to 28 U.S.C.A. § 2255 or habeas corpus while an appeal from conviction is pending.”); *Blade v. United States*, 266 F. App’x 499 (8th Cir. 2008) (unpublished) (discussing dismissal of a Section 2255 motion without prejudice when a direct appeal was pending). Because McBaine’s direct appeal remains pending before the Eighth Circuit, and because there are no extraordinary circumstances that would allow McBaine to file a § 2255 motion at this time, the Court will dismiss the motion without prejudice as premature. Finally, because McBaine has not shown that jurists of reason would find it debatable whether the motion is properly before the Court, no certificate of appealability shall issue.

Accordingly,

IT IS HEREBY ORDERED that Dean Allen McBaine’s Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence is **DISMISSED** without prejudice as premature. A separate order of dismissal will be entered herewith.

IT IS FURTHER ORDERED that the Court will not issue a certificate of appealability.

Dated this 22nd day of February, 2021.


AUDREY G. FLEISSIG
UNITED STATES DISTRICT JUDGE